Supreme Court, U.S.
FILED
JUN 2 2000
OFFICE OF THE CLERK

No. 99-1792

In The

Supreme Court of the United States

DIRECTOR OF REVENUE,

Petitioner,

vs.

COBANK, ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. HANSON
(Counsel of Record)
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7799

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?

DISCLOSURE UNDER SUPREME COURT RULE 29.6

Neither CoBank, ACB, nor the National Bank for Cooperatives has a parent corporation, and no public held company owns ten percent or more of the stock of either entity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DISCLOSURE UNDER SUPREME COURT RULE 29.6 ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION AND STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. The Petition Raises a False Question 8

II. Missouri Correctly Applied Established Principles of Law 9

III. There is No State Court Conflict Which Warrants This Court's Review 13

IV. This Case Impacts Only a Handful of Farm Credit System Institutions 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Appeal of Farm Credit Services of Central Kansas, et al., Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax App. 1999) 12

Arkansas v. Farm Credit Services of Central Arkansas, 994 S.W.2d 453 (Ark. 1999), *cert. denied*, 120 S. Ct. 1530 (2000) 12

Farm Credit Services of Central Arkansas v. Arkansas, 76 F.3d 961 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997) 12

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997), *review denied*, 690 N.E.2d 1186 (Ind. 1997) 12

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999), *review granted*, Dkt. No. 49S10-9908-TA-453 (Ind. 1999) 12

Federal Land Bank of Wichita v. Board of County Commissioners, 788 F.2d 1440 (10th Cir. 1986) 11

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 9, 10, 11

Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation, 746 So.2d 280 (La. Ct. App. 1999) 12

Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department, ___ P.2d ___, 2000 WL 300857 (N.M. Ct. App. 2000), *cert. denied*, No. 26,211 (N.M. 2000) 13

TABLE OF AUTHORITIES – Continued

Page

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142 (Mo. 2000) 6, 12

United States v. Michigan, 851 F.2d 803 (6th Cir. 1988) 11

United States v. State Tax Commission, 481 F.2d 963 (1st Cir. 1973) 10

Utah Production Credit Association v. Auditing Division of the Utah State Tax Commission, App. Nos. 97-0425 and 99-0105 (Utah State Tax Comm. 1999) 12

UNITED STATES CONSTITUTION:

United States Constitution, Article VI, clause 2 1

STATUTES:

12 U.S.C. § 2071 5

12 U.S.C. § 2077 ..... 14, 15

12 U.S.C. § 2134 ..... *passim*

12 U.S.C. § 2141 ..... 1, 2

12 U.S.C. § 2278b-6 3

OTHER:

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985) 3

Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1987) 2, 3

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 2141:

> (a) Charter
>
> The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.
>
> (b) Powers
>
> The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks except as otherwise provided for in this chapter.
>
> (c) Operation
>
> The consolidated bank shall be organized and operated on a cooperative basis.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves the question of whether Congress has authorized states to tax the income of the National Bank for Cooperatives. The Missouri Supreme Court correctly held that Congress has not authorized such taxation.

The National Bank for Cooperatives is a member institution of the Farm Credit System. It was established pursuant to Section 413 of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 413, 101 Stat. 1568, 1639 (1987). Section 413 authorized the consolidation of the existing district banks for cooperatives and the Central Bank for Cooperatives to form the National Bank for Cooperatives.

Sections 414 through 416 of the Agricultural Credit Act of 1987, now codified at 12 U.S.C. Sections 2141 to 2149, set forth the federal charter, and the powers and operations for the National Bank for Cooperatives. 12 U.S.C. Section 2141(a) states that the National Bank for Cooperatives "shall be a federally chartered instrumentality of the United States . . . "

12 U.S.C. Section 2141(b) provides that the National Bank for Cooperatives shall have "all of the powers, rights, responsibilities, and obligations of the district banks for cooperatives and the Central Bank for Cooperatives . . . " At the time of the creation of the National Bank for Cooperatives in 1989, the only statutory provision dealing with the state tax obligations of the district banks for cooperatives and the Central Bank for Cooperatives was 12 U.S.C. Section 2134. Section 2134 provides:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.[1]

The 1985 Amendment to 12 U.S.C. Section 2134

In response to the agricultural depression of the mid-1980s, Congress adopted the Farm Credit Amendments Act of 1985. Pub. L. No. 99-205, 99 Stat. 1678 (1985). As part of that legislation, Congress authorized the United States Treasury to provide new federal financial assistance to the Farm Credit System. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 4.28J, 99 Stat. 1678, 1686 (1985). The new federal investment was to be made indirectly through the Farm Credit System Capital Corporation.[2] *Id.* Previous federal funds had been provided directly to individual Farm Credit System institutions.

---

[1] The concluding phrase "except that interest . . . " was added to Section 2134 by the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 805(p), 101 Stat. 1568, 1716 (1988).

[2] The Capital Corporation was later replaced by the Financial Assistance Corporation, created as part of the Agricultural Credit Act of 1987. 12 U.S.C. Section 2278b.

As part of the Farm Credit Amendments Act of 1985, Congress also amended 12 U.S.C. Section 2134. This was done by repealing the last two sentences of Section 2134. Prior to this amendment, Section 2134 had read as follows (the language which was deleted is indicated by brackets):

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. [[Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.]]

Congress explained its reason for repealing the last two sentences of Section 2134, as follows:

> This section also contains amendments which conform specific sections of the Act to the change made by the merger of the revolving funds and the elimination of the authority to make separate investments in individual institutions. As amended by the Act, the Farm Credit Administration may only make investments from the section 4.0 revolving fund in the Farm Credit System Capital Corporation.

H.R. Rep. No. 425, 99th Cong. 1st Sess. (1985), at 28-29.

The Decision Below

In the proceeding below, the National Bank for Cooperatives sought a refund of Missouri corporate income tax for the years 1991 through 1994. At the Missouri Supreme Court, its case was consolidated with a similar case filed by various Production Credit Associations which were also seeking refunds of Missouri corporate income tax. Like the National Bank for Cooperatives, Production Credit Associations are member institutions of the Farm Credit System and "federally chartered instrumentalities of the United States." 12 U.S.C. Section 2071.

Before the Missouri Supreme Court, the National Bank for Cooperatives argued that it is a federal instrumentality and exempt from Missouri income tax absent Congressional authorization. The National Bank for Cooperatives further argued that Congress did not authorize such state taxation.

The National Bank for Cooperatives explained that prior to the 1985 amendment of Section 2134, banks for cooperatives were exempt from state tax only if the federal government had a direct investment in such banks.

This direct investment requirement was repealed simultaneously with the 1985 authorization of new indirect federal funding. Thus, as amended in 1985, Section 2134 no longer authorized state taxation of the banks for cooperatives, including the National Bank for Cooperatives, without regard to the presence of direct federal investment.

Citing a number of prior decisions holding Farm Credit System institutions exempt from state taxation after 1985, the Missouri Supreme Court held that the National Bank for Cooperatives and the Production Credit Associations are exempt. The court stated:

> [T]his Court holds, as have the other courts that have addressed the issue of state taxation of member institutions of the Farm Credit System, that appellants are exempt from state income taxation. See *Farm Credit Serv. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997); *State v. Farm Credit Serv. of Cent. Ark.*, 338 Ark. 322, 994 S.W.2d 453, 456 (1999), *petition for cert. filed*, 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); *Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n v. State*, 98 CA 1995, 1999 WL 1000995 (La. Ct. App. Nov. 5, 1999).

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142, 143 (Mo. 2000). The Missouri Department of Revenue now seeks this Court's review of the decision of the Missouri Supreme Court with respect to the National Bank for Cooperatives. For unexplained reasons, the Department has not appealed the decision with respect to Production Credit Associations.

REASONS FOR DENYING THE WRIT

The writ should be denied because this case does not involve the question which petitioner claims is present. The writ should also be denied because the Missouri Supreme Court correctly applied the established rule that federal instrumentalities are exempt from state taxation absent Congressional authorization.

The writ should be denied because the purported conflict which the petition attempts to highlight is based on one decision by the intermediate appellate court in New Mexico, holding that Congress has authorized states to tax Production Credit Associations. That decision is suspect because the court was not presented with an accurate picture of the legislative history regarding the 1985 amendments to the Farm Credit Act, and turned on the application of New Mexico statutory construction rules which authorize the New Mexico courts to ignore statutory language and substitute the courts' own view of legislative intent.

Further, because this case involves only the question of the proper construction of Section 2134, it impacts a small number of Farm Credit System entities. The issue presented is not sufficiently significant to warrant this Court's review.

Finally, if the Court is inclined to intervene on the issue of state taxation of the National Bank for Cooperatives, it should defer action pending decisions in the other state courts which are considering the question presented in this case. If these decisions establish that there is a consensus in the state courts on this issue, further review will be unnecessary.

I. The Petition Raises a False Question

The petition filed by the Missouri Department of Revenue alleges that this case raises the following question:

> Whether Congress, by repealing a contingent exemption from state taxation that included immunity from state income taxes for a Farm Credit System institution, and enacting in lieu thereof a noncontingent exemption that did not include state income taxes, permitted that institution to avoid the specific effects of the statute and partake instead of inherent immunity.

The petition's description of what Congress did in 1985 when it amended 12 U.S.C. Section 2134 is simply wrong. As discussed above, Congress repealed the last two sentences of Section 2134 which had previously authorized state taxation of district banks for cooperatives and the Central Bank for Cooperatives. It did not add anything new to the statute.

II. Missouri Correctly Applied Established Principles of Law

The Missouri Supreme Court decided this case by applying the established rule that federal instrumentalities are exempt from state tax absent Congressional authorization. Petitioner does not challenge the finding that the National Bank for Cooperatives is a federal instrumentality or that it is exempt from tax absent Congressional authorization. Petitioner claims only that Congress has authorized such taxation. Thus, this case presents only a question of the proper construction of Section 2134. It does not present any broader statutory or constitutional questions.

It is settled law that fiscal institutions chartered by Congress, such as the National Bank for Cooperatives, are exempt from state taxation in the absence of Congressional authorization to tax. In *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), this Court considered the liability of a national bank for Massachusetts sales tax. The Court stated:

> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664, 668; *Des Moines Nat. Bank v. Fairweather*, 263 U.S. 103, 106; *First Nat. Bank v. Hartford*, 273 U.S. 548, 550; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 244. As recently as 1966, Mr. Justice Fortas, speaking for a unanimous Court,

thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation:

> "In those respects in which the Red Cross differs from the usual government agency – e.g., in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs – the Red Cross is like other institutions – e.g., *national banks* – whose status as tax-immune instrumentalities of the United States is beyond dispute." *Department of Employment v. United States*, 385 U.S. 355, 360. (Emphasis added.)

392 U.S. at 340-341. While the Court did not readdress the question of whether national banks are federal instrumentalities, the Court did conclude that Congress had not authorized Massachusetts to impose the taxes in question.

In *United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), Judge Levin Campbell of the Court of Appeals for the First Circuit considered the state taxability of federal savings and loan associations. The court stated:

> It is true that the federal associations, being federal instrumentalities, are immune from state taxation by virtue of the Supremacy Clause, absent specific Congressional authorization. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819); *Agricultural Bank v. Tax Comm'n, supra*, 392 U.S. 339, 88 S. Ct. 2173, 20 L.Ed.2d 1138.

481 F.2d at 969. In *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440 (10th Cir. 1986), the Court of Appeals for the Tenth Circuit considered the state taxability of federal land banks which, like production credit associations, are member institutions of the Farm Credit System. The court stated:

> A state cannot tax a federal instrumentality absent permissive federal legislation. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968).

788 F.2d at 1441. In *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit considered the state taxability of federal credit unions. The Court stated:

> In the famous case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court established the doctrine of federal immunity from state taxation. In that case, the Court held that, absent Congressional consent, the federal government and its instrumentalities are immune from state taxation under the Supremacy Clause of the Constitution.

851 F.2d at 805.

The federal and state courts and state tax tribunals which have considered the state taxability of Farm Credit System institutions have uniformly agreed that such entities are exempt from state tax in the absence of Congressional authorization. These courts and tribunals have also uniformly agreed with the Missouri Supreme Court that Congress did not authorize state taxation of the affected

Farm Credit System institutions after 1985. These decisions include:

Farm Credit Services of Central Arkansas v. Arkansas, 76 F.3d 961 (8th Cir. 1996), *rev'd on other grounds*, 520 U.S. 821 (1997)

Arkansas v. Farm Credit Services of Central Arkansas, 994 S.W.2d 453 (Ark. 1999), *cert. denied*, 120 S. Ct. 1530 (2000)

Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142 (Mo. 2000)

Northwest Louisiana Production Credit Association v. State of Louisiana, Department of Revenue and Taxation, 746 So.2d 280 (La. Ct. App. 1999)

Farm Credit Services of Mid-America v. Department of State Revenue, 677 N.E.2d 645 (Ind. Tax 1997), *review denied*, 690 N.E.2d 1186 (Ind. 1997)

Farm Credit Services of Mid-America v. Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax 1999), *review granted*, Dkt. No. 49S10-9908-TA-453 (Ind. 1999)

Appeal of Farm Credit Services of Central Kansas, et al., Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax App. 1999)

Utah Production Credit Association v. Auditing Division of the Utah State Tax Commission, App. Nos. 97-0425 and 99-015 (Utah State Tax Comm. 1999)[3]

---

[3] Cases involving the tax exemption for Farm Credit System institutions are currently pending before the Indiana Supreme Court, the Ohio Supreme Court, and the Kansas Court of Appeals. Decisions in these cases are expected in the near future. A number of other states, including Idaho, Minnesota, Mississippi, Montana, Pennsylvania, Tennessee, and Texas have administratively agreed that Farm Credit System institutions are exempt from state income or franchise tax.

III. There is No State Court Conflict Which Warrants This Court's Review

The centerpiece of the petition in this case is a purported conflict between a decision by the New Mexico Court of Appeals in *Production Credit Association of Eastern New Mexico v. Taxation & Revenue Department*, ___ P.2d ___, 2000 WL 300857 (N.M. Ct. App. 2000), *cert. denied*, No. 26,211 (N.M. 2000), and the far greater number of cases which have found Farm Credit System institutions exempt from state taxation. The unusual circumstances of the New Mexico case suggest that it will not be followed by other courts. Thus, there is no conflict which warrants this Court's review.

On the main legal points, the decision of the New Mexico Court of Appeals is fully consistent with the analysis of the Missouri Supreme Court and the other courts which have considered the taxability of Farm Credit System institutions. The New Mexico court agreed that Production Credit Associations are federal instrumentalities. *Production Credit Association of Eastern New Mexico*, 2000 WL 300857, 3. The court also agreed that Congress must affirmatively authorize states to tax federal instrumentalities. *Id.* at 4. The court, however, concluded that Congress has affirmatively authorized states to tax Production Credit Associations. *Id.* at 8. In reaching this conclusion, the court did not have the benefit of a

complete and accurate recitation of the legislative history regarding the 1985 amendment to 12 U.S.C. Section 2077.[4]

In analyzing the legislative history of the 1985 amendment, the court was told that the change was made to eliminate outdated and surplus language. *Id.* at 6-7. The court was not told of the new federal funding authorized by Congress in 1985. The court was not told that this funding would be provided indirectly through the Capital Corporation. The court was not told that the legislative history clearly establishes that Congress amended 12 U.S.C. Section 2077 and withdrew state authorization to tax Production Credit Associations specifically because of this new indirect federal funding.[5]

Having been mistakenly persuaded that Congress intended to make only a technical change in Section 2077, the court then faced a dilemma. Congress had clearly repealed the states' authorization to tax Production Credit Associations. As the court admitted:

> We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation.

---

[4] The language and history on Section 2134 (dealing with banks for cooperatives) and Section 2077 (dealing with Production Credit Associations), and the 1985 amendments to such sections, are substantially identical. Respondent agrees with petitioner that these sections should be construed in a similar manner.

[5] The briefs to the New Mexico Court of Appeals have been lodged with the Clerk of this Court. A review of those briefs will disclose a complete absence of information and discussion of this legislative history.

Id. at 8. Not satisfied with this result, the court concluded that the perceived intention of Congress in amending the law should trump what Congress actually did. The court held:

> We must give deference to that intention. *See State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

Id. Respondent submits that if the New Mexico court had been presented with an accurate picture of the reasons for amending 12 U.S.C. Section 2077 in 1985, it would have concluded that both the action and intention of Congress were consistent. The prior grant of authority in Section 2077 permitting states to tax Production Credit Associations was repealed in 1985 because Congress was providing new federal funding to the Farm Credit System.

IV. This Case Impacts Only a Handful of Farm Credit System Institutions

This case involves only the proper construction of 12 U.S.C. Section 2134 (district banks for cooperatives and the Central Bank for Cooperatives) and 12 U.S.C. Section 2077 (Production Credit Associations). No constitutional or statutory issue is presented which will affect entities outside the Farm Credit System. The Court should

decline to review this case because of its limited importance.

CONCLUSION

If the Court is inclined to consider and decide the issue of state taxability of the National Bank for Cooperatives (and Production Credit Associations), it should wait until other state courts decide their pending cases. This will permit the Court to determine whether there is a true conflict in the state courts. If the other courts agree with the Missouri and Arkansas Supreme Courts, the overwhelming state court consensus on this issue will obviate the need for this Court's review.

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

RICHARD A. HANSON
(Counsel of Record)
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7799